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Supreme Court of the United States

October Term, 1934.

No. 528.

JOSEPH A. BRODERICK, Superintendent of Banks of the State of New York, *Appellant,* *vs.* MARY ROSNER, ESSIE R. STONE, CAMILLA LOWY, *et al.*	*Appeal from the Court of Errors and Appeals of the State of New Jersey.*

BRIEF ON BEHALF OF DEFENDANTS-APPELLEES, THE BOBDON COMPANY AND HERBERT COOPER.

Statement.

Judgment was entered in the New Jersey Supreme Court on February 14, 1934 in favor of the defendants-appellees, The Bobdon Company (spelled Bobdan in summons, complaint and schedules and throughout the proceedings), and Herbert Cooper. This judgment was affirmed by the Court of Errors and Appeals of New Jersey, September 27, 1934. The defendants-appellees were sued by Joseph A. Broderick, Superintendent of Banks of the State of New York upon the double liability assessed under New York law against them as holders of stock of the Bank of the United States, a banking corporation organized under the laws of the State of New York. The Bobdon Company is alleged to be the owner of 388 shares of the capital stock of said bank and was assessed $9,700.00, the par value of the stock. Herbert Cooper is alleged to be the owner of 60 shares and was assessed $1,500.00, the par value of the stock. The decision of the

New Jersey Supreme Court (opinion by Justice Charles W. Parker) held, in effect, as follows:

(a) That appellant's action at law was barred by Section 94b of the New Jersey Corporation Act.

(b) That the provisions of the said New Jersey statute were not violative of the United States Constitution.

(c) That appellant was entitled to access to the New Jersey courts only through the exercise of comity and in the manner provided in said statute.

Justice Parker, in his opinion (R. 19, bottom), characterizes this action in the following language:

> "This suit is not one suit, but a multiple suit, at law, clearly on behalf of creditors of a corporation, and that a foreign one, to enforce in each case a statutory personal liability of a stockholder. This is exactly what the statute forbids."

From the affirmance of the decision of the New Jersey Supreme Court by the Court of Errors and Appeals of New Jersey, appellant brings this appeal.

POINT I.

The Superintendent of Banks of the State of New York is a mere statutory receiver, does not have title to the assets of the Bank, and has not, as of right, any standing in courts outside of the State of New York.

The Superintendent of Banks of the State of New York is not a judicial officer, but is regarded by the courts of that State as a mere statutory receiver. *Matter of Union Bank*, 204 N. Y. 313, 97 N. E. 737.

The New York statutes as construed by its own courts do not vest title in the Superintendent, either as to assets located in that State or elsewhere. *Yokohama Specie Bank, Ltd.* v. *Chinese Merchants Bank*, 219 App. Div.

256 (1927). This case was submitted to the Court upon an agreed statement of facts. The plaintiff banking corporation was licensed to do business in New York; the Chinese Merchants Bank was likewise licensed to do business there. On June 13, 1924, the Superintendent of Banks of New York took possession of the Chinese Bank's assets. Three days later the Yokohama Bank sued the Chinese Bank in Illinois and levied upon certain assets located there belonging to the Chinese Bank. The Illinois proceedings were discontinued by agreement and the Illinois property brought to New York for determination of the respective rights thereto. The controversy was dismissed for the reason that it turned upon the attitude of the Illinois courts, which was a question of fact impossible to determine in the New York proceeding. In referring to the necessity of a determination in Illinois, the court said, at page 258:

> "The Superintendent of Banks in taking possession of the assets of a bank under the Banking Law is merely a receiver in the nature of a liquidator.
>
> "The corporation is not deprived of its assets and no title is vested in the Superintendent. (Mechanics & Metals Nat. Bank *v.* Banque Industrielle, 205 App. Div. 543.)"

and again, on the same page:

> "The general rule is that a liquidator in one State acquires no title to assets in another State. (Hibernia Nat. Bank *v.* Lacombe, 84 N. Y. 367; Matter of People (City Eq. Fire Ins. Co.), 238 *Id.* 147, 152; Rhawn *v.* Pearce, 110 Ill. 350.) Under exceptional circumstances the courts of this State, while recognizing this rule, have as a matter of comity accorded recognition to a foreign liquidator. (Matter of Waite, 99 N. Y. 433; Wulff *v.* Roseville Trust Co., 164 App. Div. 399.)
>
> "The criterion upon which this submission turns, therefore, is the attitude which would be taken by

the Illinois courts in recognizing the claim of the New York Superintendent of Banks, as a matter not of legal right, but of comity. We could only speculate as to what this attitude would be. Whether the court of Illinois would regard the New York liquidator, the Hongkong liquidator, or either of them, as vested with title to this fund is a question of Illinois law as yet undetermined by the courts of that State. To this court, that is a question of fact."

POINT II.

The Superintendent of Banks of the State of New York may obtain access to the courts of the State of New Jersey only through the exercise of comity.

A Receiver has no extra-territorial jurisdiction or power of official action, and is not entitled, as a matter of right, to sue in a foreign jurisdiction, and refusal of another State to entertain such suit does not amount to a failure to give full faith and credit to the laws and judgments of the State of the appointment, within the meaning of the Federal Constitution.

High, Receivers, §239; *Booth* v. *Clark,* 17 How. 322, 15 L. Ed. 164; *Filkins* v. *Nunnemacher,* 81 Wis. 91, 51 N. W. 79; *Farmers' & M. Ins. Co.* v. *Needles,* 52 Mo. 17; *Brigham* v. *Luddington,* 12 Blatchf. 237; Fed. Cas. No. 1,874; *Hazard* v. *Durant,* 19 Fed. 471.

A Receiver is often permitted, through comity or courtesy of a sister State to maintain an action therein (chiefly in cases where he has title to an asset within that State), but never where the courts of such sister State have declared the maintenance of such an action to be against the public policy of that State. In *Pond* v. *Cook,* 45 Conn. 126, the Court said:

> "Thus it appears that the property was in the possession of the defendant as receiver when it

> came into this State. He was invested with it, and was legitimately performing the duties of his appointment in completing the contract by its use when it was attached by the plaintiff. In these circumstances comity among the States requires that the case should be regarded by our courts precisely as it would have been by the courts of New Jersey if the controversy had arisen there."

The significant feature of the above quotation is that the Receiver was invested with title to the property which he was seeking to recover, which is not so in the case at bar, as the Superintendent of Banks of the State of New York does not have title to the cause of action which he now seeks to enforce in this State.

An exact paralled to the case at bar arose in Tennessee when the New York Superintendent of Banks, suing under the Statute here involved, sought to recover an assessment from a stockholder residing in Tennessee to pay the debts of the bank. The Tennessee Court held that the New York Superintendent of Banks did not possess the legal title to the claim sued on, but only the right to sue and collect, and hence that he could assert such claim only through the exercise of comity. *Van Tuyl v. Carpenter*, (1915) 135 Tenn. 629, 188 S. W. 234. While it may be competent for the State of New York to empower its Superintendent of Banks to sue delinquent resident stockholders in its own courts, it is difficult to see how that State could empower its Superintendent to recover assets located in a sister State of independent sovereignty, unless the State of New York vests in its Superintendent title to property wherever located.

We quote somewhat at length from the opinion of the Supreme Court of Tennessee in the Van Tuyl case, as follows:

> "The right of action, if any, is not in the bank but in the Superintendent of Banks. His right is

rooted in the statute, but that statute gives him no right to sue in a foreign State. Such vestiture has been held, by the highest authority, an essential prerequisite. Hale *v.* Allinson, 188 U. S. 65, 23 Sup. Ct. 244, 47 L. Ed. 388; Great Western Min. & Mfg. Co. *v.* Harris, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. Ed. 1163; Bernheimer *v.* Converse, 206 U. S. 534, 27 Sup. Ct. 755, 51 L. Ed. 1176; Converse *v.* Minn. Thresher Mfg. Co., 212 U. S. 567, 29 Sup. Ct. 691, 53 L. Ed. 654; Converse *v.* Hamilton, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913 D, 1292; Selig *v.* Hamilton, 234 U. S. 652, 34 Sup. Ct. 926, 58 L. Ed. 1518. And see Irvine *v.* Elliott (D. C.), 203 Fed. 82. * * *."

* * * * * * * * *

"The rule is general that a mere Chancery Receiver has no right to sue in a foreign State and can assert such claims as he has only through the exercise of comity on the part of the State in which he seeks to exercise his functions. Hardee *v.* Wilson, 129 Tenn. 511, 167 S. W. 475, Ann. Cas. 1916 A, 94; Booth *v.* Clark, 17 How. 322, 15 L. Ed. 164; Great Western M. & M. Co. *v.* Harris, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. Ed. 1163; Converse *v.* Hamilton, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, and the same rule would necessarily attribute the duties of a receiver to an officer of a foreign State claiming authority under a legislative Act of such foreign State, since foreign laws can have no extra territorial efficacy, save in those instances which are governed by the 'full faith and credit' clause of our Federal Constitution, and the case supposed is not one of them."

* * * * * * * * *

"However, if the Receiver has the legal title to the claim sued on, he has generally a right to sue in the foreign State (Hardee *v.* Wilson, *supra*), but the New York cases hold that the Superintendent of Banks does not possess the legal title to such

assets as are here sued on, but only the right to sue and collect. La Fayette Trust Co. *v.* Higginbotham, 136 App. Div. 747, 121 N. Y. Supp. 490; Matter of Union Bank of Brooklyn, 204 N. Y. 313, 97 N. E. 737."

* * * * * * * * *

"We may add that even if it appeared that the foreign Superintendent of Banks, or statutory receiver, had either the title to the assets, or power given him by the statute of his State, to sue in a foreign jurisdiction, or both, we do not see how he could, in a foreign jurisdiction, sue stockholders on their double liability, without a previous judicial ascertainment, in his own State, in a suit brought against the corporation, showing debts and assets and the necessity of a call on stockholders. The possession of title would be of no importance unless the amount due could be ascertained. Likewise, the right to sue in a foreign State could have no extra-territorial effect, save as an incident to a judicial proceeding in the receiver's own State, purporting to confer that right under statutory authority; it would then be operative, if at all, under the full faith and credit clause of the Federal Constitution."

* * * * * * * * *

"In writing this opinion we have assumed, as the clear weight of authority indicates, that stockholders who subscribe for stock in a corporation, in a State which at the time has a statute providing for the double liability referred to, become contractually bound to meet and carry the liability imposed by the statute; that the duty imposed is governed by the law of contract, and the payment required cannot be treated as a penalty. Whitman *v.* Oxford Natl. Bank, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587; Ferguson *v.* Sherman, 116 Cal. 169, 47 Pac. 1023, 37 L. R. A. 622; Flash *v.* Conn., 16 Fla. 428, 26 Am. Rep. 721; Bell *v.* Farwell, 176 Ill. 589, 52 N. E. 346, 42 L. R. A. 808, 68 Am. St. Rep. 194;

Stecker *v.* Davidson, 74 Kan. 214, 86 Pac. 136, 118 Am. St. Rep. 315; Pfaff *v.* Gruen, 92 Mo. App. 560, 69 S. W. 405; Hancock Natl. Bank *v.* Ellis, 172 Mass. 39, 51 N. E. 207, 42 L. R. A. 396, 70 Am. St. Rep. 232. Perhaps a better statement of the principle would be that the liability arises out of the statute which imposes it, but the statute becomes binding on the stockholder through his subscription, whereby he places himself in such relation to it, as that he is bound by its terms, and so may be said to agree by implication that he will pay when the conditions of his liability for a specified amount are lawfully made to appear. Christopher *v.* Norvell, 201 U. S. 216, 224, *et seq.;* 26 Sup. Ct. 502, 50 L. Ed. 732, 5 Am. Cas. 740; Kulp *v.* Fleming, 65 Ohio St. 321, 62 N. E. 334, 87 Am. St. Rep. 611. But if the method of ascertaining such liability is such as cannot be recognized in a foreign State because against its public policy, then such liability cannot be consistently recognized in that State. Therefore, on the grounds we have stated, such liability cannot be enforced here merely on an assessment made by the Superintendent of Banks of the State of New York; and the judgment dismissing the bill must be affirmed." (188 S. W. 237, 238.)

Appellant has listed many cases from other states in which a liquidator, receiver or similar officer has been permitted to maintain an action in a foreign state, either upon a similar liability or upon the identical liability in the instances where Superintendents of Banks have sued in other states in the Union. (See Appellant's Brief p. 42, and cases there cited.) We submit that these cases can be distinguished upon the ground that there is no vesting of title to the cause of action in the liquidating officer in this case, namely, the Superintendent of Banks of the State of New York, and that no public policy, as indicated by statute in the State of New Jersey, confronted the Receiver in those cases. Plaintiff relies on

Converse v. *Hamilton*, 224 U. S. 243. In that case the Receiver, whom the Wisconsin courts held could not sue in that State, had been appointed by the Minnesota courts in an action in which the assets and liabilities of the insolvent corporation had been marshalled, the insolvency determined, the assessment against stockholders, both resident and non-resident, fixed, and the Receiver expressly empowered to sue stockholders in Minnesota and elsewhere. These things were adjudicated in Minnesota and found expression in the order made by its courts. This court held that the orders evidencing such adjudication must be respected in Minnesota in accordance with the full faith and credit clause of the Constitution. In the case at bar there has been no judicial determination of insolvency, no assessment by any court against the stockholders sought to be sued, and no judgment or order of any court to serve as a basis for invoking the aid of the full faith and credit clause. This court also held in *Converse* v. *Hamilton, supra*, that the Receiver "became a quasi-assignee and representative of the creditors, *was invested with their rights of action* against the stockholders," and further the Receiver was "clothed with *adequate title* for the occasion"; but that holding was only necessary in distinguishing that case from *Hale* v. *Allinson*, 188 U. S. 56, and *Finney* v. *Guy*, 189 U. S. 335, in which it had been held that such a Receiver appointed under previous Minnesota statutes was not entitled to sue. The Superintendent of Banks of New York as shown in Point I of this brief does not have such title.

The same reasoning distinguishes the cases *Selig* v. *Hamilton* (Appellant's Brief p. 66), *Bernheimer* v. *Converse* (Appellant's Brief p. 60) and *Converse* v. *Aetna National Bank* (Appellant's Brief p. 63), which deal with the same statute which was involved in the above case.

We submit that whether or not a Receiver having title to a cause of action (which the New York Superintendent

of Banks does not have) can enforce his obligation in any other state, has no bearing upon the enforceability of this assessment by appellant in the State of New Jersey, and that the argument of appellant from these cases from other states is not applicable or pertinent to the issues here involved. That the action here brought does offend the public policy of the State of New Jersey (as evidenced by its refusal to create similar liability on the stockholders of its State banks and by the enactment of Section 94b of the Corporation Act, hereinafter more particularly set forth) which provides for the enforcement of such double assessment liabilities, only by the equity suit provided in the statute, requires no argument.

This Court said, in *Bond* v. *Hume*, 243 U. S. 15, at page 22, 61 L. Ed. 565, at page 568:

> "And finally, it is certain that, as it is *peculiarly within the province of the lawmaking power to define the public policy of the state,* where that power has been exerted in such a way as to manifest that a violation of public policy would result from the enforcement of a foreign contract validly entered into under a foreign law, comity will yield to the manifestation of the legislative will and enforcement will not be permitted." (Italics ours.)

Had the policy of this state been to prohibit enforcement of such liability in any court and had there been eliminated from Section 94b that portion permitting an equity action, the statute would still be constitutional, for *a state may constitutionally prohibit any suit in its courts to enforce a cause of action arising under the statutes of a sister state,* provided it does not thereby discriminate against citizens of other states. *Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142, 52 L. Ed. 143, is the leading case. Suit was brought in Ohio on a death action arising under a Pennsylvania statute, the deceased having been a citizen of Pennsylvania. Judgment for the plaintiff in the trial court was reversed by the Ohio Supreme Court

because an Ohio statute provided that recovery could be had under the statute creating a cause of action for a wrongful death in foreign states only when the deceased was a citizen of Ohio. This Court affirmed the action of the Ohio Supreme Court. After stating the rule of the privileges and immunities clause, the Court said on page 146 of L. Ed.:

> "But, subject to the restrictions of the Federal Constitution, the state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what extent the state will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. * * * But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states."

It was held that the Ohio statute was constitutional, for it did not discriminate between plaintiffs or beneficiaries, but as to the *subject matter of the suit.* The Court said that the plaintiff has "been denied access to the Ohio courts * * * because the cause of action which she presents is not cognizable in those courts."

This Court has held in *Finney* v. *Guy*, 189 U. S. 335, that "whether a state court should permit an action to be maintained therein on the principle of comity between the states is a question exclusively for the courts of that state to decide," to which it may here be added that the legislature in the present instance undertook to decide that question itself.

POINT III.

The Courts of Law of the State of New Jersey are not the proper forum for the enforcement of this assessment.

Appellant has relied upon many cases in this Court and the lower Federal Courts in support of his contention that the action upon the stock assessment should be brought in a law court. These cases, arising under the National Bank Act, while construing an act similar in intent and form, cannot be said to be dispositive of the matters here involved. The Federal law is binding upon the courts of the several states wherever the power of Congress to enact legislation is exercised within its constitutional limits. Neither the courts of New Jersey by their decisions, nor the legislature by its enactments, could limit the force of the National Bank Act. The fact that the Comptroller by the provisions of the National Bank Act has been given wide discretionary powers as to the determination of assessments, and his receivers wide authority as to the enforcement of the assessments, when lawfully made, is no basis for the conclusion that the Superintendent of Banks of New York State has similar powers and prerogatives, and that the Statute of New York State dealing with similar subject matter is entitled to the same weight in New Jersey or any other state. It is conceded that Section 94b of the Corporation Act, could not, even if it sought to limit the power the Comptroller of the Currency, be effective for that purpose. The Act, by its very terms does not seek to limit the Comptroller's power, as it only regulates the enforcement of a statutory personal liability created by or arising from the statutes or laws *of another state or foreign country*.

The fallacy in appellant's argument that the decisions in the Federal Courts construing the provisions of the National Bank Act are of prime authority on the questions here involved is that the State of New York is not the

Federal Government, and that the statutes of New York do not supersede the statutes of New Jersey when they may conflict. The Federal cases to the effect that the action under the National Bank Act double liability provisions is at law are numerous and conclusive. As above stated, Section 94b of the Corporation Act does not seek to limit any action brought under the National Bank Act to the jurisdiction of the Court of Chancery, nor would its attempt so to do be effective. The argument that the rule of the Federal Courts, applicable to assessments levied by the Comptroller of the Currency applies and controls the assessment enforcement through the office of the Superintendent of Banks of the State of New York is a *non sequitur*.

As shown under Point II, *supra*, the State of New Jersey could have closed its courts to the Commissioner of Banking and Insurance of the State of New York in attempting to enforce stockholders' liabilities. However, the legislature has seen fit to give a remedy by a suit in the nature of an equitable accounting in the Court of Chancery. The appellant must be content therewith. The fact that in the State of New York the Commissioner is authorized by a particular statute to maintain his action in the law courts, has no effect upon the determination of another state of its policy with regard to such action. The State of New Jersey is not obliged to give the New York Superintendent of Banks the same mode of procedure under which he may sue in his home state. The power to exclude him from its courts *a fortiori* includes the power to designate a particular tribunal before which the action must be brought and to circumscribe the procedure by such means as the State of New Jersey deems necessary for the orderly procedure of the administration of justice in its courts.

Under Point II of appellant's brief (p. 82), several New Jersey cases are cited as authority for the maintenance of

the present action at law and allegedly holding that a Court of Chancery does not have jurisdiction in this type of case. We submit that appellant is confusing the liability on an unpaid stock subscription with the statutory double liability. The case of *McDermott, Receiver,* v. *Woodhouse,* 87 N. J. Eq. 615, is concerned with the question of the enforcement of a stockholder's liability on unpaid stock, and not with the question of a statutory personal liability on stock already fully paid. It is conceded that an action for the balance of the subscription price of stock may be maintained at law in New Jersey. This case does not deal with the right of a Receiver to sue in another jurisdiction, and is not pertinent.

The case of *Chicago Title & Trust Co.* v. *Young,* 90 N. J. Eq. 27, was an action brought to levy an assessment on behalf of creditors upon the holders of stock of an Illinois corporation for the unpaid subscription price of said stock, and is not applicable for that reason. The case of *Graham* v. *Fleissner,* 107 N. J. L. 278, was also an action against stockholders for the purpose of enforcing the "Trust Fund" liability against individual shareholders. The defendant sought to bar that action under the authority of Section 94b of the Corporation Act. In Justice Parker's opinion, speaking for the New Jersey Court of Errors and Appeals, he said:

> "We do not take this view of the matter; on the contrary, we agree with counsel for respondent that the phrase 'statutory personal liability' in the statute means personal liability imposed by statute *extra* the common law liability to make up a deficit of par value, i. e., the so-called 'trust fund' theory of capital stock" (107 N. J. L., at p. 280).

This case is also not applicable.

POINT IV.

Section 94b of the Corporation Act of the State of New Jersey does not violate the Constitution of the United States or amendments thereof.

The statute here in question, which bars the instant action, provides as follows:

> "No action or proceeding shall be maintained in any court of law of this state against any stockholder, officer or director of any domestic or foreign corporation by or on behalf of any creditor of such corporation to enforce any statutory personal liability of such stockholder, officer or director for or upon any debt, default or obligation of such corporation, whether such statutory personal liability be deemed penal or contractual, if such statutory personal liability be created by or arise from the statutes or laws of any other state or foreign country, and no pending or future action or proceedings to enforce any such statutory personal liability shall be maintained in any court of this state other than in a nature of an equitable accounting for the proportionate benefit of all parties interested, to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties" (P. L. 1897, p. 125; 2 Comp. Stat. 1656).

The above quoted statute has been passed upon in two instances. In *Western National Bank* v. *Reckless*, 96 Fed. 70, it was held that the statute was not effective to bar a suit for the enforcement of stock assessment liability where the liability sought to be so enforced arose before the passage of the Act. The Act was passed before the organization of the Bank of the United States and for that reason the above case is not pertinent. In *Cochrane* v. *Morris*, 10 N. J. Misc. 82, the statute was held to be a bar to just such a suit as is here brought in that case that of a liquidator of a Florida bank attempting to recover

from a stockholder, a resident of New Jersey, a one hundred per cent. statutory assessment.

This court stated in the case of *Missouri* v. *Lewis*, 101 U. S. 22:

> "It is the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter, and amount, and the finality and effect of their decisions, provided it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United States, and does not deprive any person of his rights without due process of law, nor deny to any person the equal protection of the laws, including the equal right to resort to the appropriate courts for redress. The last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress. Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny to it this right. We think it is not denied or taken away by any thing in the Constitution of the United States, including the amendments thereto."

A. The New Jersey statute is not violative of Art. IV, Section 1 of the Constitution of the United States in denying full faith and credit to the public acts, records and judicial proceedings of another state. It has gener-

ally been held by the courts that the full faith and credit clause is not jurisdictional but merely provides a rule of evidence. *Anglo-American Provision Co.* v. *Davis Provision Co.*, 191 U. S. 373, 48 L. Ed. 225; and cases cited therein; *Clifford* v. *Williams*, 131 Fed. 100; *Israel* v. *Israel*, 130 Fed. 237. In *Anglo-American Provision Co.* v. *Davis Provision Co., supra*, Mr. Justice Holmes, speaking for this Court, said,

> "• • • The parties are both Illinois corporations, and the plaintiff-in-error brought suit in the New York Supreme Court upon an Illinois judgment. By the New York Code of Civil Procedure, section 1780, it is provided that 'an action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only: • • • 3. Where the cause of action arose within the state, etc.' • • •
>
> "The state court decides that the cause of action did not arise within the state in the sense of the words of the Code, and, of course, we follow its construction, subject to the inquiry whether the statute as construed is consistent with the Constitution of the United States • • •.
>
> "We are of opinion that the section of the Code as construed is not unconstitutional. The precise point has not been decided by this court, but it has been laid down in cases which raise greater difficulties than the present, that this provision of the constitution establishes a rule of evidence rather than of jurisdiction. Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 291, 32 L. Ed. 239, 243, 8 Sup. Ct. Rep. 1370; Andrews *v.* Andrews, 188 U. S. 14, 36, 47 L. Ed. 366, 371, 23 Sup. Ct. Rep. 237. The Constitution does not require the State of New York to give jurisdiction to the supreme court against its will. If the plaintiff can find a court into which it has a right to come, then the effect of the judgment

> is fixed by the Constitution and the act in pursuance of it which Congress has passed. Rev. Stat. section 905 (U. S. Comp. Stat. 1901, p. 677). But the Constitution does not require the state to provide such a court * * *."

It is submitted that under the authority of the above case and the cases therein cited, the legislature of the State of New Jersey would have had the power to enact legislation prohibiting the enforcement of this assessment in its courts and that, therefore, it was within its powers in providing a remedy, whether the same be reasonable or otherwise, in which manner alone this assessment can be enforced. We have heretofore, under Point II, shown that the Commissioner of Banking and Insurance of the State of New York may obtain access to New Jersey courts only through the exercise of comity. The Commissioner of Banking and Insurance of the State of New York has no right to insist upon the same method of procedure in this State as is afforded him in his home State, but must be content, under the cases above cited, with the remedy which the legislature and the courts of the State of New Jersey have seen fit, under their policy, to extend to him.

It is important to note as we have stated above that in this case there has been no judicial proceeding of any kind in the State of New York by virtue of which the relation between the Superintendent of Banks and the Bank of the United States was fixed. Nor has there been any judicial determination of insolvency or of the respective rights of creditors and stockholders. There is no judgment or judicial records upon which the Superintendent of Banks can rely in invoking the full faith and credit clause.

No case in which that clause has been held controlling has been found where such a state of facts existed. See

McNnett v. *St. Louis & S. F. R. Co.*, 292 U. S. 230, 78 L. Ed. 1227. Mr. Justice Brandeis said (78 L. Ed. 1228, 1229):

"'The plaintiff contends that by refusing to entertain jurisdiction, the state court has denied him a right expressly conferred by Congress and guaranteed by the Federal Constitution. The defendant insists that the statute as construed is consistent with the Federal Constitution; since a state may determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them; *Angelo-American Provision Co.* v. *Davis Provision Co.*, 191 U. S. 373, 48 L. Ed. 225, 24 S. Ct. 92; *Chambers* v. *Baltimore & O. R. Co.*, 207 U. S. 142, 148, 149, 52 L. Ed. 143, 146, 147, 28 S. Ct. 34, and the extent to which its courts shall become a forum for the trial of transitory causes of action arising in other states. *Missouri P. R. Co.* v. *Clarendon Boat Oar Co.*, 257 U. S. 533, 66 L. Ed. 354, 42 S. Ct. 210; *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377, 73 L. Ed. 747, 49 S. Ct. 355.'

. . . . . .

"'The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution. The privileges and immunities clause requires a state to accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens. *Corfield* v. *Coryell*, 4 Wash. C. C. 371, 381, Fed. Cas. No. 3,230. Compare *Canadian Northern R. Co.* v. *Eggen*, 252 U. S. 553, 64 L. Ed. 713, 40 S. Ct. 402. The full faith and credit clause requires a state court to take jurisdiction of an action to enforce a judgment recovered in another state, although it might have refused to entertain a suit on the original cause of action as obnoxious to its public policy.'" (Citing cases.)

It would be most unreasonable and unjust for this court to hold that a state is compelled by the full faith and credit clause of the Constitution to give effect to the *ex parte* determination of an administrative officer of another state which has no judicial sanction and from which no appeal lies, the effect of which is to saddle a liability on its citizens contrary to the public policy of the state as expressed in its statutes.

B. Section 94b of the Corporation Act of the State of New Jersey is not violative of the provisions of Art. XIV of the amendments to the Constitution of the United States.

Due process of law under the United States Supreme Court decisions does not mean any particular form of process applicable to all cases in all jurisdictions, but means any reasonable process under which a litigant may have a fair trial in a court of justice. This is summarized in appropriate language in the case of *Davidson v. The Board of Administrators*, 24 L. Ed. 616, 96 U. S. 97, where the court said,

(24 L. Ed. at page 620):

> "It is not possible to hold that where, by the laws of the State, the party aggrieved has, as regards the issues affecting his property, a fair trial in a Court of Justice, according to the modes of proceeding applicable to such case that he has been deprived of that property without due process of law" (Citing further cases).

It is well established that whether or not a right exists depends upon the law of the state where it was created. But the remedy for enforcing any such right depends upon the law of the state where it is sought to be enforced.

De La Vega v. *Vianna*, 1 Barn. & Ad. 284, (K. B. 1830); *Herrick* v. *Minneapolis & St. L. R. Co.*, 31 Minn. 11, 47

Am. Rep. 771, 16 N. W. 413; *Northern P. R. Co.* v. *Babcock*, 154 U. S. 190, 197, 38 L. Ed. 958, 960, 14 Sup. Ct. Rep. 978; *Marshall* v. *Sherman*, 148 N. Y. 9, 34 L. R. A. 757, 51 Am. St. Rep. 654, 42 N. E. 419; *Leucke* v. *Tredway*, 45 Mo. App. 507.

There is no vested right in the special remedial procedure outlined in Section 80 of the New York banking law. *Schriver* v. *Woodbine Savings Bank*, 285 U. S. 467, 479, 76 L. Ed. 884, 892; *Howarth* v. *Angle*, 162 N. Y. 179, 188. These cases recognize that where a statute creates a liability of stockholders to assessment, although the liability is transitory, the special statutory forms of remedy provided by such statute may not be resorted to elsewhere. Section 80 of the banking law of New York is such a special form of remedy upon the obligation created by Section 120 of that Act and by the New York Constitution. The principle declared in the cases last cited is persuasive of appellees' contention that in seeking to enforce this liability outside of New York, appellant must *accept* whatever remedies are provided by the forum, whether reasonable or otherwise.

As was held in *Louisville & Nashville R. R. Co.* v. *Schmidt*, 177 U. S. 230, 44 L. Ed. 747:

> "It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts, or regulate practice therein."

We submit, as hereinbefore stated under Point III that the State of New Jersey is not obliged to give the New York Superintendent of Banks the same form of due process which he may enjoy in his home state. It is within the province of the legislature of the State of New Jersey to designate the tribunal within which he must sue and the regulations circumscribing his procedure may be estab-

lished as those which the legislature deems necessary for the orderly procedure of the administration of justice in its courts.

The statute of New Jersey, even though it be construed as prohibiting plaintiff's action in that state, does not destroy plaintiff's property right or deprive him of his property because it affects the remedy and not the property right. The State of New Jersey cannot add to or detract from the right or property created in the plaintiff by the laws of the State of New York. Plaintiff's property, if any, remains undisturbed by any statute of the State of New Jersey. Since that State is without power to deprive him of his property, it is without the power to deprive him of his property without due process of law. See *Blake* v. *McClung*, 172 U. S. 239, 259, 260.

The plaintiff states that because of the number of stockholders and creditors of the Bank of the United States, it is impossible for him to proceed under the New Jersey statute. We doubt if there is any real impossibility, but even if there were it would be no ground for holding the statute invalid. It was adopted long before the Bank of the United States was organized and should not be considered in the light of any particular case which it affects. Statutes requiring judicial accountings are neither unusual or unique and the size of the litigation affected by such a statute should not be controlling of the constitutional questions involved.

POINT V.

The entry of a judgment, final in form, by the New Jersey Supreme Court was proper.

Appellant argues, under Point III of his brief (p. 83) that in any event a *final* judgment should not have been entered in the court of original jurisdiction. We submit that appellant is barred from raising this objection. Justice

Parker's opinion, which was delivered prior to the entry of the order, concludes:

> "As I view the matter now, it would seem that there should be a judgment for the moving defendants subject of course to appeal, and without prejudice to the filing of a bill in equity on the lines laid down in section 94-b of the Corporation Act. The matter might be transferred to the Court of Chancery, but the complaint would have to be reframed, I think in any event.
>
> "I will hear counsel on the first convenient motion day as to settlement of these details" (R. 21).

Pursuant to his statement, counsel were heard on a motion day following the rendering of the opinion. At that time, Justice Parker asked appellant's counsel whether he desired to amend or reframe his complaint so that the matter could be transferred to the Court of Chancery for proceedings in accordance with Section 94b of the Corporation Act. Appellant's counsel, in open court, stated that appellant would stand or fall on the complaint as it was before Justice Parker. The order striking the complaint recites the failure to make such an application.

> "ORDERED, that plaintiff's complaint be and the same hereby is struck out as to the above named defendants, and it appearing that no application is made by plaintiff to amend said complaint, it is further * * *" (R. 22).

Under these facts, appellant has no standing to urge now that a final judgment should not have been entered. Whether or not his complaint may be reframed and an action instituted in Chancery of New Jersey for the enforcement of the obligation is a matter of local procedure and is not presently before this Court.

CONCLUSION.

It is respectfully submitted that the judgment of the New Jersey Supreme Court, as affirmed by the Court of Errors and Appeals of New Jersey, should be in all respects affirmed.

J. H. HARRISON,
Of Counsel with Defendants-Appellees,
The Bobdon Company, a corporation,
and Herbert Cooper.